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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/040,046

10/19/2001

John B. Taylor

396542

1834

7590

10/27/2006

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EXAMINER

LEVY, NEIL S

ART UNIT

PAPER NUMBER

1615

DATE MAILED: 10/27/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/040,046

Applicant(s)

TAYLOR, JOHN B.

Examiner

NEIL LEVY

Art Unit

1615

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 02 October 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-14 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-14 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

### DETAILED ACTION

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All amended new claims must be underlined in their entirety. Please underline each of claims 3-14. Maintain the modifiers, such as "previously amended, twice amended, previously presented or added (claims 4,5 for instance) " -as appropriate. These claims have been considered in view of applicant's arguments & amendments.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

### *Specification*

The amendment filed 10/02/05 is objected to under 35 U.S.C. 132(a) because it introduces new matter into the disclosure. 35 U.S.C. 132(a) states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows: alkynyl.

Applicant is required to cancel the new matter in the reply to this Office Action.

Applicant's arguments that this is a foreign spelling are confusing-please identify the foreign document the language came from. We find no such priority document in this case, and applicant's prior cases, and this case lists a US address. Examiner finds no basis for the correction. Please remove, as it constitutes new matter.

### *Claim Rejections - 35 USC § 112*

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

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The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1, 3-14 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Alkynyl has no support. Examiner suggests stating the specific carbon chains desired to be claimed, that are not supported.

The formula for the second salt has 3 o's, 1 with 5 bonds, please correct.

Claim 1, 3-14 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

"In vivo " is not in the specification, regardless of applicant's arguments for comprehension of the newly introduced terminology.

Claims 1, 3-14 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The language is confusing;

Applicant has shown only the K phosphonate and phosphate mixes of Table 6, and as (a) and (b) sources of claims 3, 6, 9, and 12 are in open guise, thus (a) and (b) are seen as claimed in addition to the organic compounds of the 2 claim 1 salts. Only the single example of K phosphonate and K phosphate was shown to function & only to one species as a growth stimulant when applied as foliar treatment.

For example, Claim 4 would seem to require k Phosphonate & another claim 1 salt, & K phosphate, & another claim 1 salt, in meeting the "according to claim 1" language.

***Claim Rejections - 35 USC § 102***

Claim 2 stands rejected under 35 U.S.C. 102(b) as being anticipated by .

FENN et al '84.

1 part to 100 parts meets the claim 2 range of 0.001-1.0 ratios of the 2 components of the composition, regardless of intended use or effects thereof.

Claim 2 stands rejected under 35 U.S.C. 102(b) as being being anticipated by DOLAN et al '88.

DOLAN also mixed potassium phosphate in [p.977] water phosphoric acid and Fosetyl- Fosetyl breakdown would provide Ca, as well [p.974] as the K from potassium phosphate, at the instant ratios of phosphate and phosphonate.

Claims 1 -14 are rejected under 35 U.S.C. 102(e) as being anticipated by HSU

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See Col. 2, description—a fertilizer of phosphorus to phosphate @ 1:20 to 20: 1 is provided; the salts are potassium salts, (lines 64,col 2-lin7 col. 3) Examples VIII ,IX, XIII, XIV illustrate the compositions , prior to dilution, & able to be applied for foliar application, as at example 3 (col. 6). The compositions are diluted & applied to plants, thus constituting the instant in vivo fertilizer, as they accelerate plant growth, & also provide control of fungus disease, as they improve disease resistance(bottom, Col 1). The instant methods are recognized as immediately envisioned application of the diluted compositions, exemplified @ col. 4, & in the foliar application test, Experiment 3. Since the same components are mixed as instantly claimed in these (col. 4) examples the compounds , mono, di & tri potassium phosphorous acid salts with phosphoric acid

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Salts, would be present after mixing potassium hydroxide with phosphorous acid & phosphoric acid. The Ratio & concentration of the salts are of the instant claimed level when adjusted by dilution to use levels, such as the 1/250 dilution of experiment 3.

### ***Double Patenting***

Claims 1,2 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 5,6 of U.S. Patent No. 5736164. Although the conflicting claims are not identical, they are not patentably distinct from each other because the composition as claimed, ratios & concentrations are those of the patent, although intended use differs.

Claims 1,2 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1,2,5,6 of U.S. Patent No. 5925383. Although the conflicting claims are not identical, they are not patentably distinct from each other because the composition as claimed, ratios & concentrations are those of the patent, although intended use differs, they would function the same.

Claim 1,2 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 3,4,11,13 of U.S. Patent No. 6338860.

Although the conflicting claims are not identical, they are not patentably distinct from each other because the composition as claimed , ratios & concentrations are those of the patent, although intended use differs, they would function the same, fertilizer & fungicide

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

### ***Response to Arguments***

Applicant's arguments filed 10/02/05 have been fully considered but they are not persuasive.

Applicant's arguments have been considered in the rejections above. Claim 2 rejections are not overcome by applicant's arguments of different purposes, functions or case law, because a composition is claimed, and prior art has it : only the ratios of the 2 components, 1000 fold range, are claimed, not concentrations & the effective amounts do not give life & breath to a composition, known, whether solid, solution or dispersion- none of which forms are claimed.

The method claims are considered as dependent on potentially allowable composition claims, if amended to correct 112 issues of inconsistencies and failure to identify the metes and bounds of the claims.

.Any inquiry concerning this communication or earlier communications from the examiner should be directed to NEIL LEVY whose telephone number is 571-272-0619.

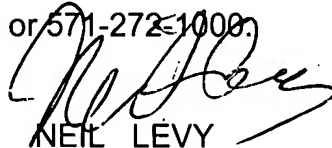
The examiner can normally be reached on Tuesday-Friday, 7 AM to 5:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, MICHAEL WOODWARD can be reached on 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.



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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

  
NEIL LEVY  
Primary Examiner  
Art Unit 1615

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